Home Care Network, Inc. *and* SEIU District 1199, The Health Care and Social Service Union.[1]
Case 8–RC–16635

August 2, 2006

DECISION AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, KIRSANOW, AND WALSH

The National Labor Relations Board has considered determinative challenges in an election held July 29, 2004, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 23 for and 23 against the Petitioner, with 3 challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions[2] and briefs, and has adopted the hearing officer's findings[3] and recommendations.

Following a July 29, 2004 election, the Board held a hearing on three determinative challenged ballots, those of voters Tonya Davis, Kelly Bays, and Teasha Woods-Boyd. These voters worked as "home health aides," providing personal care and light housekeeping for clients in the clients' homes. Before the election, all three voters sustained injuries that prevented them from working. It is undisputed that they are not "absent without leave," and they have been off work due to their medical conditions. It is also undisputed that the Employer has never terminated any of the three voters or notified any of them that they were terminated. The Employer also concedes that none of the three voters had resigned.

The hearing officer applied the well-established Board standard that presumes an employee on sick or disability leave to be eligible to vote absent an affirmative showing that the employee has resigned or been discharged. See *Red Arrow Freight Lines*, 278 NLRB 965 (1986); *Pepsi-Cola Co.*, 315 NLRB 1322 (1995). Under that standard, the hearing officer found that Davis, Bays, and Woods-Boyd all were eligible voters.[4] Applying the same standard, we reach the same result.

Our dissenting colleague would abandon the Board's *Red Arrow* test, and instead apply the "reasonable expectancy of return" test that the Board applies to determine the eligibility of employees on layoff status at the time of the election. The dissent contends that the *Red Arrow* test "elevates form over substance" and is contrary to Board principles. We disagree.[5]

As the Board and courts have reiterated, the *Red Arrow* test avoids unnecessary litigation and "endless investigation into states of mind or of future prospects."[6] Abandoning this predictable, bright-line rule in favor of "reasonable expectancy of recall" could require the Board to evaluate medical evidence, potentially opening "a new avenue of litigation, possibly involving paid expert testimony, which is beyond the traditional expertise of the agency and inimical to the efficient and expeditious resolution of questions concerning representation."[7] For these reasons, the Board has repeatedly rejected the test proposed by the dissent, and the courts of appeals have uniformly upheld the Board's adherence to the *Red Arrow* test. See *Supervalu, Inc.*, 328 NLRB 52 (1999), and cases cited therein. We find no persuasive reason to abandon the *Red Arrow* test, the origins of which date back more than 50 years. See, e.g., *Sylvania Electric Products*, 119 NLRB 824, 832 (1957); *Wright Mfg. Co.*, 106 NLRB 1234, 1236–1237 (1953) (both cited in *Red Arrow*, supra).[8] Accordingly, we adhere to the settled and time-tested *Red Arrow* rule.[9]

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[1] We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO effective July 25, 2005.

[2] We have treated the Employer's request for review as exceptions to the hearing officer's report, pursuant to Sec. 102.69(e) of the Board's Rules and Regulations.

[3] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[4] The hearing officer also found support for this conclusion in the fact that Davis and Bays continued to receive work-related mail while they were absent, as well as the fact that Davis was compensated for her attendance at mandatory meetings held by the Employer. In addition, the hearing officer found that the Employer was made aware of the voters' medical conditions by various workers' compensation documents, doctors' slips, and reports of Bays' health condition that she and her mother provided. Finally, the hearing officer noted testimony by the Employer's Director of Nursing that the three voters would be considered eligible for employment, with corporate approval, upon demonstrating the ability to perform the duties of a home health aide.

[5] The dissent does not dispute the eligibility of Davis, Bays, or Woods-Boyd under the *Red Arrow* test.

[6] *Vanalco, Inc.*, 315 NLRB 618 fn. 4 (1994) (citing *Whiting Corp.*, 99 NLRB 117, revd. 200 F.2d 43 (7th Cir. 1952), quoted in *NLRB v. Newly Weds Foods*, 758 F.2d 4, 8 (1st Cir. 1985) (Breyer, J.)).

[7] *Cavert Acquisition Co. v. NLRB*, 83 F.3d 598, 606 (3d Cir. 1996) (quoting *Associated Constructors*, 315 NLRB 1255, fn. 3 (1995)).

[8] Contrary to our dissenting colleague, we are not persuaded to abandon the *Red Arrow* test by the fact that difficult questions sometimes arise over the eligibility of laid-off employees. The existence of such situations does not undermine the Board's policy of favoring

DIRECTION

IT IS DIRECTED that the Regional Director for Region 8 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Tonya Davis, Kelly Bays, and Teasha Woods-Boyd. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. August 2, 2006

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, concurring and dissenting in part.

Contrary to my colleagues, I would not apply the test of *Red Arrow Freight Lines*[1] to determine the voting eligibility of employees who are absent from their employment for medical reasons. Rather, I agree with former Member Babson's dissent in *Red Arrow*, and the views of several subsequent Board Members, that the appropriate standard is whether the absent employee, as of the date of the election, has a reasonable expectancy of returning to his or her unit employment.[2] Applying that standard, I concur in my colleagues' overruling of the challenges to the ballots of Kelly Bays and Teasha Woods-Boyd, but I would sustain the challenge to the ballot of Tonya Davis.

Under the *Red Arrow* test, an employee on medical leave is presumed to remain eligible to vote, unless the presumption is rebutted by a showing that the employee has resigned or been discharged.[3] This standard elevates form over substance. Specifically, it considers the employee's formal status on the employer's rolls, but not the more fundamental matter of whether the employee has a foreseeable ability to return to the job. In the view of my colleagues, if the employee has not resigned or has not been formally terminated, he is eligible to vote, even if there is virtually no chance that he will ever return to the unit. In my view, if there is no foreseeable prospect that the employee will ever return to the job, he/she does not have a community of interest with the employees performing unit work.

The Board's application of the *Red Arrow* test is contrary to the principles that normally guide Board policy in representation elections. For example, in layoff cases, the reasonable expectancy of return test is the Board's established eligibility standard.[4] In my view, regardless of whether the employee is away from his or her position because of the employer's economic circumstances or because of the employee's medical condition, the essential question for eligibility purposes remains the same: Does the employee share a community of interest with the other members of the bargaining unit? The answer to that question, in turn, depends on whether the employee can reasonably expect to resume his or her position in the unit.

The *Red Arrow* doctrine also leads to incongruous results. For example, in *Supervalu*, the Board found an employee eligible to vote, despite his 2-year absence due to serious medical conditions including advanced emphysema, heart failure, and severe exogenous obesity, and despite his physician's testimony that he "never" expected a marked change in his condition, as would be necessary for his return to his truckdriver position. In my view, the fact that the employer had not formally removed him from the employment rolls did not contradict the fact that he was not going to return to the unit.

expeditious resolution of questions concerning representation over possibly protracted investigation and litigation of medical evidence that is beyond the Board's traditional expertise. Our colleague acknowledges that the question of an employee's reasonable expectancy of returning to work in the layoff context is determined *in view of economic factors*, and is not generally based on medical evidence. Therefore, the layoff situation is not analogous to this case.

[9] Member Schaumber concurs in the result, based on extant Board law, but he would modify the test in *Red Arrow Freight Lines, Inc.*, 278 NLRB 965 (1986), for the reasons set forth by former Member Hurtgen in *Supervalu, Inc.*, 328 NLRB 52, 52–53 (1999) (Member Hurtgen, dissenting). In a situation such as that of Davis in this case, in which affirmative evidence demonstrates that an employee is subject to permanent medical restrictions that preclude the performance of the duties of the position, and the employer has no other suitable bargaining unit position available, Member Schaumber would find that the employee is not eligible to vote. Additionally, if an employee has been on leave for a year or more, he would require the party asserting eligibility to show that the employee has a reasonable expectation of returning to the unit.

[1] *Red Arrow Freight Lines, Inc.*, 278 NLRB 965 (1986).

[2] *Red Arrow*, supra (Member Babson, dissenting); *Vanalco, Inc.*, 315 NLRB 618 (1994)(Member Cohen, dissenting); *Supervalu, Inc.*, 328 NLRB 52 (1999)(Member Hurtgen, dissenting).

[3] *Red Arrow*, supra, at 965.

[4] See, e.g., *Madison Industries*, 311 NLRB 865 (1993); *S&G Concrete Co.*, 274 NLRB 895 (1985).

By setting so low an eligibility threshold for employees on medical leave, *Red Arrow* accepts the ballots of individuals who no longer have substantial ties to the unit, thereby diluting the votes of those who do. For example, if an employer, for purely humanitarian reasons, decides to keep an employee on the payroll, that employee will be eligible to vote, even if there is little or no chance of his returning to the unit.

If the employee has resigned or been discharged, he is ineligible under the *Red Arrow* standard and under my standard, for he has no reasonable expectancy of return. But, as former Member Hurtgen pointed out in his dissent in *Supervalu*, there are many circumstances in which an employee who has not resigned or been terminated similarly has no reasonable expectancy of return. Unlike the *Red Arrow* standard, the reasonable expectancy of return test evaluates the particular circumstances of each challenged voter and his or her continuing ties to the unit. Thus, if an employee on medical absence can reasonably expect to resume his unit employment in the future, his right to vote would be protected. On the other hand, employees who have no such reasonable expectation would not be permitted to vote in an election in which they have no genuine stake.

My colleagues say that the *Red Arrow* test is a bright-line rule that avoids unnecessary litigation and the Board's examination of medical evidence. However, the Board routinely handles such matters in other contexts. For example, the Board regularly determines whether, in view of economic factors, a laid-off employee has a reasonable expectancy of returning to work. The issues can be difficult, involving a multi-factor prognostication of how a company will fare in the future. The question of whether these issues are more or less difficult than a medical prognostication is beside the point. The point is that both issues involve the question of whether an employee is likely to return to the unit and thereby share a community of interest with the extant employees.

Further, even though these factual issues may be difficult to resolve in a particular case, it is important to do so in order to accurately identify, especially in a close election, the individuals who are properly included in the bargaining unit and eligible to vote in the election. Furthermore, my test does not threaten to take away the eligibility of employees in marginal situations. The burden of proof lies with the party that asserts an employee's ineligibility.

As support for their continuing adherence to the *Red Arrow* rule, my colleagues also argue that the courts of appeals have upheld Board decisions based on that rule. The courts' acceptance of a Board rule, however, does not suggest that the courts have found the rule to be the best or even an advisable approach, but simply reflects the courts' policy of deference with respect to Board rules. For example, in *NLRB v. Economics Laboratory*,[5] the court remarked that the employer's arguments against *Red Arrow* had "much to commend them." Similarly, in *Cavert Acquisition v. NLRB*, the court emphasized the limitations of its review.[6]

Applying the reasonable expectancy of return test to the facts of this proceeding, I would find that employees Bays and Woods-Boyd are eligible to vote in the election. Bays was struck by an automobile during the week of April 17, 2004,[7] and sustained several broken bones that required two surgeries. A doctor's slip, dated May 12, lists Bays' return to work date as September 1. Although a doctor's slip, dated October 11, revised the return date to December 6, I find that, as of the election date of July 29, Bays had a reasonable expectancy of returning to her unit position and should be permitted to vote.[8]

Woods-Boyd sustained a back injury in a work-related automobile accident in December 2003. She periodically performed light duty work for the Employer until she requested temporary total compensation on April 7.

After that date, she performed no work at all. An April 7 physician's report to the Bureau of Workers' Compensation states that Woods-Boyd was not able to return to her position at that time and lists an expected return date of June 9. The Bureau of Workers' Compensation awarded temporary total disability payments for the period from April 8 until August 21.[9] I find that, as of the July 29 election, Woods-Boyd had a reasonable expectancy of returning to her unit position and was therefore eligible to vote.

On the other hand, I would find employee Davis ineligible to vote under the reasonable expectation of return standard. Davis underwent total knee replacement surgery as a result of job-related injuries. She last performed her job as a home health aide on January 8, although she was paid for attending federally required in-service meetings and a campaign meeting held by the Employer after that date. An April 17 Individualized Vocational Rehabilitation Plan, which was completed for the Bureau of Workers' Compensation by the managed care organization handling Davis' claim, states that her

[5] 857 F.2d 931, 935 (3d Cir. 1988).

[6] 83 F.3d 598, 602–607 (3d Cir. 1996).

[7] All dates are 2004 unless otherwise indicated.

[8] On July 29, Bays was also cleared to do light duty work. However, this is not unit work, and she never actually returned to perform it. Consequently, I do not rely upon this fact.

[9] A subsequent medical report, dated October 13, states that Woods-Boyd was able to return to work, with an estimated return date of December 30.

physician had prescribed permanent work restrictions prohibiting lifting over 30 pounds and kneeling. The Plan further states that, according to her physician, she should not lift or transfer patients. The document adds,

> This causes elimination of returning to work at the same job/same employer, and different job/same employer, (per discussion with the employer representative). Ms. Davis' permanent restrictions and the lack of a different position with the employer of record, place her at different job/different employer.

A "functional limitations" document completed by Davis' doctor on June 7, stated that Davis could not squat, climb, or crawl at all, and that she could do no kneeling.

The permanent work restrictions imposed by Davis' physician preclude the performance of her duties as a home health aide, the only job classification in the bargaining unit. I find that, even though she remained on the Employer's rolls at the time of the election, Davis had no reasonable expectancy of returning to work in her former position, and therefore no continuing community of interest with unit employees. Accordingly, I would sustain the challenge to her ballot.

Dated, Washington, D.C. August 2, 2006

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Robert J. Battista, Chairman

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